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No. 91-1267

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

B.J. ALAN COMPANY, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), is a changed circumstance requiring the Interstate Commerce Commission to reopen a decision finding that a common carrier did not violate its common carrier obligation by refusing to carry common fireworks.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) and the underlying agency decisions (Pet. App. 8a-17a, 18a-25a) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1991, and a petition for rehearing was denied on December 10, 1991 (Pet. App 6a). The petition for a writ of certiorari was filed on February 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The "filed rate doctrine" of the Interstate Commerce Act (ICA) requires that motor common carriers file tariffs with the Interstate Commerce Commission setting forth the rates that they charge for the services they hold out. 49 U.S.C. 10761 and 10762. Under the common carrier obligation, which is codified in the ICA at 49 U.S.C. 11101(a), common carriers must provide service within the scope of their holding out on reasonable request. Congress did not define the term "reasonable request," nor did it specify how carriers can broaden or narrow their holding out.

In the early days of regulation, when licenses were narrowly drawn and entry into the industry was limited, the ICC construed the obligation relatively strictly: the Commission's policy was to equate a carrier's holding out with its license, and to require carriers to serve all shippers within the scope of their licenses. See *Restrictions on Service by Motor Common Carriers*, 111 M.C.C. 151 (1970) (*Restrictions*). As motor carrier entry controls and rate regulation were relaxed, however, the Commission moved away from this strict interpretation, and in 1983 it announced that carriers can reasonably refuse to provide service that is within the scope of their licenses if providing such service would be "economically or operationally impracticable." *Elimination of Certificates As the Measure of "Holding Out"*, 48 Fed. Reg. 11,136 (1983) (*Elimination*).[1]

[1] The Commission's 1983 action in *Elimination*, which reversed the approach set out in *Restrictions*, followed the declaration of the United States Court of Appeals for the Fifth Circuit that "[a] common carrier is free to carve out as large or as small a [niche] as it feels appropriate." *Steere Tank Lines, Inc.* v. *ICC*, 675 F.2d 103, 105 (5th Cir. 1982) (per curiam), citing *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1915).

2. In 1987, United Parcel Service, Inc., a motor common carrier, filed with the Interstate Commerce Commission a tariff announcing its intention to terminate its holding out to carry common fireworks. After unsuccessfully seeking to enjoin the tariff in court,[2] various fireworks shippers filed a complaint before the ICC, alleging that the tariff was unlawfully discriminatory and in violation of the common carrier obligation. The Commission initially held that UPS's termination of service was unreasonably discriminatory (Pet. App. 61a-83a) (*UPS I*). On reconsideration, however, the Commission reversed, finding that UPS's action could not be discriminatory because it treated all fireworks shippers the same (Pet. App. 26a-60a) (*UPS II*).[3]

3. In *UPS II* the Commission assessed UPS's proposed service termination in light of the standard it had set up in 1983 in *Elimination*. Applying the "operationally impracticable" test, the ICC found that UPS had justified its refusal to serve fireworks shippers. The fireworks trade, which is subject to a variety of federal, state, and local laws, is highly concentrated during the short season preceding the July 4th holiday. The Commission found that, because many fireworks shippers had proven "unwilling or unable to conform" (Pet. App. 39a n.8) to destination prohibitions and permit requirements, the expensive and time-consuming task of ensuring compliance had fallen on UPS. *Id.* at 29a-30a, 45a. Adding to this burden was the fact that, during this concentrated transportation period, UPS had to comply with United States Department of Transportation

[2] *In re United Parcel Service, Inc. (Ohio)*, 839 F.2d 1195 (6th Cir. 1988) (per curiam).

[3] That finding was summarily affirmed on appeal (*B.J. Alan Co. v. ICC*, 897 F.2d 561, 564 n.3 (D.C. Cir. 1990) (*B.J. Alan I*)), and is not at issue here.

regulations requiring placards on trucks transporting 1,000 pounds or more of fireworks. *Id.* at 30a, 45a-46a. These unique difficulties, the Commission found, hampered the efficient operation of a "system that derives its strength from the ability to ignore the contents of the package and treat all packages alike." *Id.* at 39a n.8. Accordingly, the Commission approved UPS's proposed cancellation of service.

4. The court of appeals affirmed. *B.J. Alan Co.* v. *ICC*, 897 F.2d 561 (D.C. Cir. 1990) (*B.J. Alan I*).[4] The court thoroughly addressed and rejected petitioners' claim that "[a]n unlimited duty of carriage was [historically] the rule" (*B.J.Alan I*, 897 F.2d at 563), and that thus the Commission lacked authority to approve UPS's discontinuance of service. The court also affirmed the Commission's factual finding that fireworks shipments caused UPS inordinate operational problems and that, therefore, the service was operationally impracticable. *Id.* at 564-565.

5. Petitioners did not seek further review of *B.J. Alan I* either before the court of appeals or before this Court. Instead, they filed various papers before the agency seeking to have the proceeding reopened.[5] Long after *UPS II* had become administratively final, petitioners filed the instant petition to reopen, contending that under *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), the Commission could not allow carriers to limit their holding

[4] Petitioners' application for a stay of the Commission's decision pending the appeal was denied by this Court. *B.J. Alan Co.* v. *ICC*, 492 U.S. 935 (1989).

[5] Under 49 U.S.C. 10327(g)(1) and 49 C.F.R. 1115.4, the Commission may reopen a proceeding at any time on its own initiative or at the request of a party because of material error, new evidence, or substantially changed circumstances.

out to anything less than the full extent of their existing operational capacity.[6]

6. The Commission refused to reopen the proceeding. Pet. App. 8a-17a. Noting that the common carrier obligation—unlike the filed rate doctrine—has never been considered absolute, the Commission found that *UPS II* was not inconsistent with any statutory directive or Supreme Court precedent. *Id.* at 12a-13a. For that reason, it concluded that petitioners' "reliance on *Maislin* as a basis to reopen is misplaced." *Id.* at 14a.

7. Petitioners sought review of the refusal to reopen in the United States Court of Appeals for the Sixth Circuit, which transferred the proceeding to the District of Columbia Circuit. Finding that the *Maislin* decision established no new principles of law, the District of Columbia Circuit concluded that petitioners had not demonstrated that *Maislin* was a changed circumstance, and that petitioners' real basis for reopening was their claim of material error. Pet. App. 2a-3a (*B.J. Alan II*). Because an agency's decision not to reconsider based on material error is unreviewable (*ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987)), the court summarily denied the petition for review. Pet. App. 3a.

ARGUMENT

The opinion of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is not warranted.

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[6] In *Maislin*, this Court held that the Commission had violated the legislatively and judicially mandated filed rate doctrine by adopting a policy under which common carriers that had offered reduced (but unfiled) rates might be barred from collecting their higher filed rates in a later collection case.

Petitioners incorrectly contend that *Maislin* established a new rule of law that requires reconsideration of the decisions in the UPS litigation. In fact, *Maislin* simply reiterates the established principle that an agency must follow its statute, as interpreted by a series of Supreme Court decisions establishing a longstanding precedent.[7] That is scarcely a new principle of law constituting a changed circumstance sufficient to require a reopening in this case.[8]

Nor does the specific holding of *Maislin*—that the ICC may not undercut the filed rate doctrine by requiring carriers to charge their negotiated but unfiled rates—require reopening of the Commission's decision in the UPS litigation, which involved the interpretation

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[7] Petitioners' contention that *Maislin* placed new limitations on the ICC's discretion under *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to interpret ambiguous statutory language is refuted by *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, No. 90-1419 (Mar. 25, 1992), slip op. 8-11. In *National R.R. Passenger Corp.*, this Court explained that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law" (slip op. 9, citing *Chevron*)—in that case, those principles required deference to the ICC interpretation of a term in the Rail Passenger Service Act of 1970, 45 U.S.C. 562(d). See also *Maislin*, 110 S. Ct. at 2771-2772 (Scalia, J., concurring); *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). Nor did *Maislin* reduce the agency's ability to modify policies to keep up with new developments in the industry. 110 S. Ct. at 2770, citing *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967).

[8] Petitioners also contend that the Commission incorrectly interpreted its governing statute and longstanding precedent concerning the extent of the common carrier obligation. But that is the very argument that petitioners advanced unsuccessfully in *B.J. Alan I*. Petitioners did not seek timely review of *B.J. Alan I* in this Court, and therefore cannot challenge that aspect of the decision now.

of an entirely different provision of the ICA.[9] Petitioners assert that the logic of *Maislin* requires the conclusion that a common carrier may not narrow its holding out of service to less than the full extent of its authority. This assertion ignores the differences both in the relevant statutory commands, and in the applicable judicial precedents.

As the Court emphasized in *Maislin*, 110 S. Ct. at 2765-2767, the ICA has long been read to "create strict filed rate requirements" (*id.* at 2766) which "govern[] the legal relationship between shipper and carrier" (*id.* at 2765)—a "rigid approach" (*id.* at 2766) deemed necessary to prevent evasion of the Act's requirements. In contrast, 49 U.S.C. 11101(a), incorporating the common carrier obligation, requires the carrier to "provide the transportation or service on reasonable request"—thus providing room for consideration of equitable and discretionary factors in the determination of what constitutes a "reasonable" request.[10]

Although they rely heavily on a few passing references to the common carrier obligation in early cases (Pet. 15), petitioners cite no decision of this Court construing the "reasonable request" requirement as narrowly as they suggest here. And they certainly offer no explanation of why the reasonableness of the request should not be considered in light of current conditions,

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[9] Indeed, to the extent that *Maislin* has any relevance to this case, UPS complied with the filed rate doctrine by putting its service limitation into a tariff.

[10] As the Commission observed in *UPS II*, "even in the earliest rail cases, the obligation to provide service was not held to be absolute, but rather was qualified by a rule of reason that excused carriers from service failures that were reasonable under the prevailing circumstances." Pet. App. 41a, citing *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1915).

including the current regulatory and economic context in which the shipper and the carrier are operating. Petitioners' contention that *Maislin* constitutes a changed circumstance requiring reopening of the UPS litigation thus overlooks the significant differences between the filed rate doctrine and the cases interpreting that doctrine on the one hand, and the common carrier obligation and the cases interpreting that obligation on the other.

In sum, petitioners have not demonstrated the existence of any material changed circumstance or new evidence requiring reconsideration of *UPS II*. Instead, petitioners' only real claim is that that decision involved material error—the claim that was rejected in *B.J. Alan I*. It is clear that the refusal to reopen *UPS II* to consider a claim of material error is not itself reviewable. *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 280 (1987). Thus, the court of appeals correctly denied the instant petition for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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